

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 7
)	
LESLIE V. MARCINEK)	CASE NO. 03-60955-MHM
)	
Debtor)	
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NEIL C. GORDON, Trustee)	
)	
Plaintiff)	ADVERSARY PROCEEDING
)	NO. 03-6401
v.)	
)	
GREGORY J. MARCINEK)	
ROBERT V. MARCINEK)	
NANCY H. SCHNEIDER)	
)	ORDER GRANTING MOTION
Defendants)	FOR SUMMARY JUDGMENT

This adversary proceeding is before the court on Trustee's motion for summary judgment. On August 1, 2003, Trustee filed a complaint against Defendants alleging that, slightly more than 90 days before Debtor filed her bankruptcy petition, she sold her residence and then transferred the proceeds of that sale, \$37,300, to Defendants: Specifically, Trustee alleges Debtor transferred \$20,000 to her brother, Gregory J. Marcinek; \$14,300 to Robert V. Marcinek, her father; and \$3,000 to Nancy H. Schneider, her close friend. Trustee seeks to avoid and recover these transfers pursuant to 11 U.S.C. §547.

In response to Trustee's complaint, all three Defendants filed answers *pro se*. Each of the answers was a general denial. On March 3, 2004, Trustee filed a motion for summary judgment against all three Defendants. In that motion, Trustee based his assertion that the

material facts are undisputed upon Defendants' failure to respond to Trustee's requests for admissions. Apparently in response to Trustee's motion for summary judgment, each of Defendants filed another "Answer" accompanied by a "Declaration" in which they each asserted that Debtor was solvent on the date of the alleged preferential transfers and did not become insolvent as a result of the transfers. Defendants presented no evidence or argument in support of their bald assertions regarding Debtor's solvency and offered no other evidence or argument in opposition to Trustee's motion for summary judgment.

On May 7, 2004, in order to afford these *pro se* Defendants an informed opportunity to respond to the motion for summary judgment, this court entered an order, which stated that the "Answers" accompanied by the "Declarations" were insufficient to provide grounds to deny Trustee's motion for summary judgment. That order also briefly explained Defendants' responsibilities in connection with responding to a motion for summary judgment; and explained the consequences of failure to respond. That order also allowed Defendants an additional 20 days within which to file a response to Trustee's motion for summary judgment. No responses were filed by Gregory J. Marcinek or Robert V. Marcinek. As a consequence, pursuant to BLR 7007-1(b), Trustee's motion is deemed unopposed and, pursuant to BLR 7056-1(b)(2), Trustee's statement of undisputed material facts is deemed admitted.

Apparently in further response to Trustee's motion for summary judgment, Defendant Nancy J. Schneider filed an affidavit in which she states that she and Debtor have been friends since 1974; that she loaned Debtor \$3,000 in August, 2002, and that she was repaid by Debtor October 11, 2002. Ms. Schneider also states in the affidavit that she is not related to Debtor, has no business relationship with Debtor outside of the single loan of \$3,000, and that the loan

to Debtor was a *bona fide*, arms-length transaction. She also states that Debtor did not discuss with Ms. Schneider the timing of the loan, its repayment or Debtor's bankruptcy filing.

Trustee filed a reply in which he admitted that Ms. Schneider's affidavit was sufficient to create an apparent dispute regarding Ms. Schneider's status as an insider. Trustee asserts, however, that Ms. Schneider's conclusory statements are insufficient to create a dispute of fact precluding summary judgment.

Because the transfer which Trustee seeks to recover from Ms. Schneider occurred more than 90 days before the petition was filed, under §547(b)(4)(B), Trustee must show that Ms. Schneider was an insider. Section 101(31) of the Bankruptcy Code provides that an "insider" of an individual debtor includes:

1. A relative of the debtor;
2. A partnership in which the debtor is a general partner;
3. A general partner of the debtor; or
4. A corporation of which the debtor is a director, officer, or person in control.

11 U.S.C. § 101(31). Case law recognizes, however, that the use of the term "includes" signifies Congress' recognition that the list set forth in §101(31) is not an exclusive list of entities that may be considered insiders. *Hirsch v. Tarracone (In re Tarracone)*, 286 B.R. 256 (Bankr. S.D. N.Y. 2002); *Schreiber v. Stephenson (In re Emerson)*, 235 B.R. 702 (Bankr. D. N.H. 1999).

Generally, two factors are the focus of an inquiry concerning insider status: (1) the closeness of the relationship between the transferee and the debtor, and (2) whether the

transactions between the transferee and the debtor were conducted at arm's length. *Emerson*, at 707. The *Emerson* court listed 11 factual elements which have been considered in determining whether an individual is an insider:

1. Whether the loan made to the debtor was documented (e.g., promissory note, mortgage, and specified repayment terms);
2. Whether the loans were made on an unsecured basis and without inquiring into the debtor's ability to repay the loans;
3. Whether the transferee knew that the debtor was insolvent at the time the debtor made the loans or recorded the security agreements;
4. Whether numerous loans existed between the parties;
5. Whether any strings were attached as to how the debtor could use the loan proceeds;
6. Whether the loans were commercially motivated;
7. Whether the transferee had an ability to control or influence the debtor;
8. Whether a personal, business, or professional relationship emerges between the transferee and the debtor, allowing the transferee to gain an advantage such as that attributable simply to affinity;
9. Whether the transferee had authority to make business decisions for the debtor;
10. Whether the evidence shows a desire to treat the transferee differently from all other general unsecured creditors;
11. Whether an agreement existed among the parties to share profits and losses from business transactions.

Id. (Citations omitted). The indicia of insider status in the instant case are: Ms. Schneider was a close and long-time friend of Debtor; Ms. Schneider made a no-interest loan to Debtor without any promises regarding the timing of repayment; if a promissory note exists, it has not

been produced by Ms. Schneider; the loan was presumptively unsecured; it can be inferred that the loan was motivated by friendship rather than any commercial purpose; and it can be inferred that the parties' friendship would create a desire to treat Ms. Schneider differently from other unsecured creditors. Although Ms. Schneider asserts the loan was an arms-length transaction, the facts suggest otherwise. The available facts compel a conclusion that Ms. Schneider was an insider at the time of the transaction with Debtor and the transfer from Debtor to Ms. Schneider is an avoidable preferential transfer.

Similarly, Trustee has set forth undisputed facts sufficient to show Debtor's transfers to Defendants Gregory Marcinek and Robert Marcinek were avoidable preferential transfers. By their failure to respond, Defendants Gregory Marcinek and Robert Marcinek are deemed to have admitted those facts. Accordingly, it is hereby

ORDERED that Trustee's motion for summary judgment against Defendants Gregory J. Marcinek, Robert V. Marcinek, and Nancy H. Schneider is granted.

The Clerk, U.S. Bankruptcy Court, is directed to serve a copy of this order upon Plaintiff's attorney, Defendant's attorney, and the Chapter 7 Trustee.

IT IS SO ORDERED, this the ____ day of November, 2004.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE

***REMINDER - return to pat to do judgments when this order is prepared in final ***